IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND (GREENBELT)

ANDREA JACKSON CANNON	*	
Plaintiff	*	
v.	*	Case No. 12-cv-00377-RWT
WELLS FARGO BANK, N.A.	*	
Defendants	*	

* * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF
<u>WELLS FARGO'S MOTION TO DISMISS</u>

Defendant, Wells Fargo Bank, N.A. ("Wells Fargo" or "the Bank"), by its undersigned attorneys, pursuant to Local Rule 105, hereby files this Memorandum in Support of its Motion to Dismiss, filed contemporaneously herewith. For the reasons set forth more fully below, that Motion should be granted.

INTRODUCTION

This case was filed by the Plaintiff, Andrea Cannon, who is the owner/operator of several day care centers in Washington, D.C. and the surrounding Maryland and Virginia suburbs. At all times relevant hereto, Wells Fargo was acting as the servicer for the mortgage loan on a day care center she owns in Prince George's County, Maryland. Plaintiff now sues Wells Fargo, individually, and as the representative of a putative class of similarly-situated persons, claiming that the Bank was not authorized to purchase substitute hazard insurance coverage for the

property and seeking millions of dollars in damages. However, the Complaint[1] fails to state a claim upon which relief can be granted. Each and every action undertaken by Wells Fargo was expressly authorized and agreed to by the Plaintiff in her loan agreement. Furthermore, she has failed to satisfy the elemental requirements for her claims, and she has suffered no monetary damages. Accordingly, as set forth more fully below, this Motion to Dismiss should be granted.

BACKGROUND

On May 8, 2007, the Plaintiff took out a mortgage loan with Wells Fargo's predecessor-in-interest, Wachovia Bank, N.A., which was secured by a Deed of Trust on her day care center property located at 12400 Fort Washington Road, Fort Washington, Maryland 20744 (the "Property"). The original principal amount of the loan was $178,659.60. Complaint ¶ 14-15 and Exhibit 6.[2]

Pursuant to that Deed of Trust, the Plaintiff was required to maintain adequate hazard insurance on the Property, which stands as collateral for the outstanding mortgage loan obligation. *See* Plaintiff's Exhibit 6 at § 5. In the event the Plaintiff failed to maintain adequate insurance on the Property, Wells Fargo was entitled to obtain substitute coverage ("Lender-Placed Insurance" or "LPI") at its own initiative:

> If Trustor fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect

[1] The original Complaint in this case was filed on February 7, 2012. On February 23, 2012, the Plaintiff purported to file an Amended Complaint (Doc. No. 3). Wells Fargo was not served with original process until the following day, February 24, 2012. *See* Affidavit of Service (Doc. No. 5). Pursuant to the terms of Rule 15 of the Federal Rules of Civil Procedure, a plaintiff may undertake an amendment to the complaint only within 21 days *after* service upon the defendant. Accordingly, the Plaintiff's attempt to file an Amended Complaint on February 23 is a premature nullity, and Wells Fargo is responding to the only operative pleading -- i.e. the original Complaint -- in this Motion to Dismiss.

[2] The actual exhibit label on the Deed of Trust document reads only "DT." However, this particular document was electronically filed as "Document 1-6," indicating that it was intended to be the sixth exhibit to the Complaint.

> Trustor's equity in the property, or the contents of the property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. *Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Trustor could have obtained.* Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by the Security Instrument.
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> . . .
>
> If Lender requires, Trustor shall promptly give to Lender copies of all policies, renewal certificates, receipts of paid premiums and renewal notices.

Id. (emphasis added). The Plaintiff in this case does not contest her obligation to maintain hazard insurance, to provide proof thereof when requested, or the Bank's right to obtain substitute LPI coverage in the absence of such proof. The gravamen of the Plaintiff's Complaint against Wells Fargo is that it improperly obtained substitute LPI coverage on the Property while her privately-obtained insurance was in effect, thereby creating unnecessary redundant coverage at an excessive premium. As discussed below, none of Plaintiff's allegations states a claim.

STANDARD OF REVIEW

The purpose of a motion to dismiss filed pursuant to Federal Rule 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999). The complaint itself must demonstrate "entitlement to relief" that consists of more than "a formulaic recitation of the elements of a cause of action" or "naked assertions devoid of further factual enhancement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950. Dismissal is proper when the face of the complaint reveals the existence of a meritorious defense. *Brooks v.*

City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996). In this case, taking all well-pled facts and the inferences derived therefrom in favor of the Plaintiff, she nonetheless has failed to state a cognizable claim that entitles her to relief.

ARGUMENT

In her Complaint, the Plaintiff purports to set forth the following Counts against Wells Fargo: (1) breach of contract; (2) violation of the Maryland Consumer Protection Act; (3) fraudulent misrepresentation/concealment; (4) breach of fiduciary duty; (5) unjust enrichment; (6) conversion; and (7) negligence/negligent misrepresentation. However, for the reasons set forth more fully below, none of these Counts states a claim against Wells Fargo upon which relief can be granted and therefore the Complaint should be dismissed in its entirety. (For analytical purposes, the causes of action are discussed in an order not presented in the Complaint, with the tort actions first, followed by the Maryland Consumer Protection Act, and then the breach of contract claim.)

I. WELLS FARGO CANNOT BE HELD LIABLE IN TORT TO THE PLAINTIFF.

Counts III, IV, V, VI and VII in the Complaint all purport to state common law tort claims against Wells Fargo. There is, however, an overarching problem with all of these claims. In Maryland, a tort duty usually does not arise out of a contractual relationship, except in the presence of special circumstances. *See Blondell v. Littlepage*, 413 Md. 96, 991 A.2d 80 (2010); *Jacques v. First National Bank*, 307 Md. 527, 515 A.2d 756 (1986). For example, in the context of negligence and fraud claims, the Court of Appeals has stated:

> The mere negligent breach of a contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort.
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> . . .

> Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition of the imposition of tort liability.
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> . . .
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> By contrast, where the risk created is one of personal injury, no such direct relationship need be shown and the principal determinate becomes forseeability.

Blondell, supra, 413 Md. at 120-21, 991 A.2d at 94-95.

The allegations Plaintiff presents here all relate to a business contract – a Deed of Trust for a business. As such, the relationship was contractual in nature and Plaintiff has pleaded no facts to support any kind of "special relationship." Therefore, all of the tort claims asserted here are precluded because of the Plaintiff's failure to allege sufficient special circumstances necessary to create any tort duties beyond the contractual duties undertaken by mutual consent in the four corners of the written agreement. In the absence of such special circumstances, the Maryland courts do not recognize any tort arising out of a contract. For this reason alone, this Court should dismiss Counts III-VII.

II. WELLS FARGO DID NOT MISREPRESENT OR CONCEAL ANYTHING FROM THE PLAINTIFF.

Turning to the individual tort claims, in Count III of her Complaint, the Plaintiff charges Wells Fargo with fraud/deceit, claiming that Wells Fargo had actual knowledge of Plaintiff's existing insurance, that it obtained the LPI unnecessarily, unilaterally, and without Plaintiff's knowledge for the purpose of receiving a kick back. She also claims that Wells Fargo perpetrated a fraud upon her and concealed the existence of the LPI. *See* Complaint ¶ 42.

However, the Plaintiff has failed to meet the elemental pleading requirements for fraud. "In Maryland, to state a cause of action in fraud or deceit, a Plaintiff must allege facts disclosing: (1) that the defendant made a false representation to the Plaintiff, (2) that is falsity was either

known to the Defendant or that the representation was made with reckless indifference to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation." *Alleco, Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 340 Md. 176, 195, 665 A.2d 1038, 1047 (1995); *see also, Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 439 A.2d 534 (1982). In this case, the Plaintiff has failed to allege not just one, but practically all of the five elements necessary in order to state a prima facie case for fraud or deceit. For example, because the Plaintiff never paid any LPI premium, she did not suffer any compensable injury here. Furthermore, she has not demonstrated exactly what Wells Fargo said or communicated that was false, or how she possibly could have relied on such a representation. In short, the allegations of fraud lack any real substance.

This lack of sufficient factual allegation is especially problematic because Plaintiff's fraud claim is subject to heightened pleading requirements. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This means that "the pleader must state the time, place, and content of the false representations, the facts misrepresented and what was returned or given up as a consequence of the fraud." *United States v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981); *see also Cozzarelli v. Inspire Pharmaceuticals Corp.*, 549 F.3d 618 (4th Cir. 2008). The Plaintiff here has not made even a cursory attempt to comply with Federal Rule 9(b) in her Complaint. Wells Fargo is left to guess at what representations it made that are alleged to be false, who communicated them, and how and when they were transmitted. Count III is woefully deficient both substantively and procedurally. Accordingly, her fraud claim should be dismissed.

III. WELLS FARGO DOES NOT OWE A FIDUCIARY DUTY TO THE PLAINTIFF.

In Count IV of the Complaint, the Plaintiff charges Wells Fargo with breach of fiduciary duty in its purchase of the LPI policy at issue. However, under well-settled Maryland law, "the relationship of a bank to its customer in a loan transaction is ordinarily a contractual relationship between a debtor and a creditor, and is not fiduciary in nature." *Parker v. Columbia Bank*, 91 Md. App. 346, 368, 604 A.2d 521, 532 (1992). *See also Yousef v. TrustBank Savings, F.S.B.*, 81 Md. App. 527, 568 A.2d 1134 (1990). "Courts have been exceedingly reluctant to find special circumstances sufficient to transform an ordinary contractual relationship between a bank and its customer into a fiduciary relationship or to impose any duties on the bank not found in the loan agreement." *Parker, supra*, 91 Md. App. at 369, 604 A.2d at 532.

In the Complaint, the Plaintiff has failed to cite any "special circumstances" or any provision in her loan agreement with Wells Fargo that could conceivably transform the ordinary debtor-creditor relationship here into one attended by a heightened fiduciary duty. Thus, there is no basis to find or impose a fiduciary duty on Wells Fargo here. Even if there were, the placement of LPI by Wells Fargo in light of the Plaintiff's refusal to produce evidence of insurance, and the subsequent cancellation of the LPI once that proof was finally tendered, cannot be construed as a breach of any duty, fiduciary or otherwise. For all these reasons, this Count in the Complaint should be dismissed.

IV. WELLS FARGO HAS NOT BEEN UNJUSTLY ENRICHED.

In Count V of the Complaint, the Plaintiff alleges that Wells Fargo has been unjustly enriched by the LPI transaction and should be required to disgorge its profits. Complaint ¶¶ 51-55. In particular, the Plaintiff alleges that Wells Fargo "charge[d] Plaintiff with the premium for the purchase of the coverage and paid a kick-back to an affiliate in the form of a commission for

the unauthorized, illegal transaction." *Id*. at ¶ 52. She then claims that "Defendant received revenue from Plaintiff's funds and was unjustifiably enriched at Plaintiff's expense and to the detriment of Plaintiff." *Id.* at ¶ 53. "It is illegal and unethical to allow Defendant to retain all of the profits generated from the illicit use of Plaintiff's funds." *Id.*

However, the Plaintiff has once again failed to meet the elemental pleading requirements under Maryland law. In order to set forth a claim for unjust enrichment, three distinct elements must be established: "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *Caroline County Commissioners v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 95, 747 A.2d 600, 607 (2000).

Plaintiff intimates (without expressly pleading) that she actually paid the LPI premiums, although she never did. From that premium, she claims that a "kick back" was paid to a Wells Fargo affiliate in the form of a commission. However, it is axiomatic that a kick back cannot be extracted from a premium payment and paid to a third party if there is no premium paid by the Plaintiff in the first instance.

Finally, her vague references to "profits" retained by the Bank are not substantiated by any details that would give this Court reason to believe Wells Fargo received any form of profit at all on this transaction. While Wells Fargo was required to purchase substitute LPI due to the Plaintiff's breach of her duty to provide proof of insurance, the corresponding premium charge that was initially placed on the Plaintiff's account was subsequently reversed. Just where any profit appears in this transaction is a mystery.

Apart from the failure to properly allege the elemental requirements for unjust enrichment, "it is settled law in Maryland, and elsewhere, that a claim for unjust enrichment may not be brought where the subject matter of the claim is covered by an express contract between the parties." *FLF, Inc. v. World Publications, Inc.*, 999 F.Supp. 640, 642 (D. Md. 1998); *Dunnaville v. McCormick & Co.*, 21 F.Supp.2d 527, 535 (D. Md. 1998). In the present case, each and every action undertaken by Wells Fargo and about which the Plaintiff complains was expressly delineated in and authorized by the written contract between them. Thus, even if the Plaintiff had properly set forth all three elements of this cause of action, the remedy would not be available to her because the subject matter of her claim is covered by an express contract.

For all the foregoing reasons, the Plaintiff has failed to state a claim for unjust enrichment upon which relief can be granted and Count V should be dismissed.

V. NO PROPERTY OR FUNDS OF THE PLAINTIFF HAVE BEEN CONVERTED.

In Count VI of her Complaint, the Plaintiff charges Wells Fargo with liability for common law conversion, claiming that "Defendant illegally obtained Plaintiff's funds and used the same to unjustly enrich itself through the use of the funds for investment purposes." Complaint ¶ 57. "The used (sic) of the funds constitutes conversion of the same." *Id.* ¶ 58. The Plaintiff also alleges that Wells Fargo "refused to credit Plaintiff with the premiums amount illegally charged to her for the illegal purchase of the CPI along with interest and profit received from said funds by Defendant during the time the funds were used." *Id.* ¶ 60. Once again, the Plaintiff has failed to properly allege the elemental requirements for this common law tort and her claims are facially specious in any event.

In Maryland, conversion is an intentional tort, consisting of two elements – a physical act combined with a certain state of mind. *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 841 A.2d 828 (2004).

> The physical act can be summarized as "any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it."
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> . . .
>
> Besides the physical act of exerting unlawful control, there is an intent element to the tort of conversion, and a wide-range of different states of mind qualify. At a minimum, a defendant liable of conversion must have "an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights."

Id., 379 Md. at 261, 262, 841 A.2d at 835, 836 (citations omitted). A claim for conversion will lie in regard to intangibles like money so long as the plaintiff can allege that the defendant converted specific segregated or identifiable funds. *Lawson v. Commonwealth Land Title Ins. Co.*, 69 Md. 476, 518 A.2d 174 (1986).

In the present case, because the property that has been allegedly converted here is the Plaintiff's money, she must be able to identify those funds by location and amount. However, the Plaintiff never parted with any monies as a result of the Bank's purchase and subsequent cancellation of the substitute LPI. Without being able to identify either any tangible or intangible property that has been converted and over which Wells Fargo continues to exercise unlawful dominion or control, this claim necessarily fails and should be dismissed.

VI. WELLS FARGO HAS NOT BREACHED ANY DUTY OF DUE CARE TO THE PLAINTIFF.

In Count VII of her Complaint, the Plaintiff charges Wells Fargo with negligence or, alternatively, negligent misrepresentation, in the purchase of the LPI policy at issue in this case. Under Maryland law, in order to maintain an action in negligence, "a plaintiff must prove the existence of four elements: a duty owed him, a breach of that duty, a causal connection between the breach and the injury, and damages." *Montgomery Cable Vision Ltd. Partnership v. Beynon*, 116 Md. App. 363, 392, 696 A.2d 491 (1997). In contrast, the prima facie elements of the

related tort of negligent misrepresentation are "(1) the defendant owing a duty of care to the plaintiff negligently asserts a false statement; (2) the defendant intends that his statement will be acted upon by the plaintiff; (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury; (4) the plaintiff justifiably takes action in reliance on the statement; and (5) the plaintiff suffers damage proximately caused by the defendant's negligence." *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 656-57, 679 A.2d 540 (1996). Yet, regardless of whether this Count is treated as one for negligence or negligent misrepresentation, the Plaintiff once again has failed to allege the requisite elements.

First and foremost, the Plaintiff cannot point to any manner in which Wells Fargo has breached any duty of care it might have owed to her. The Plaintiff precipitated the purchase of LPI by her own refusal to respond to several reasonable requests to produce proof of insurance on the Property. Only when *she* breached the contract by not providing evidence of insurance was Wells Fargo required to invoke its rights defined in the Deed of Trust and obtain the substitute LPI policy. Further, contrary to the suggestions made by the Plaintiff in her pleading, her consent was not required and she was given ample warning of the intended purchase of the LPI through a series of letters and notices Wells Fargo sent to her.

Finally, the Plaintiff has not shown how she relied on any statement that was made by any Wells Fargo employee, or how she was injured as a result of the claimed breach of duty here. In fact, she has not suffered any injury at all. Accordingly, Count VII of the Complaint should be dismissed.

VII. WELLS FARGO HAS NOT VIOLATED THE MARYLAND CONSUMER PROTECTION ACT.

All of Plaintiff's tort claims are deficient as a matter of law, as discussed above. Turning to the non-tort claims – i.e. violation of the Maryland Consumer Protection Act and breach of contract – these both fail as well.

In Count II of the Complaint, the Plaintiff purports to set forth a claim for violation of the Maryland Consumer Protection Act, § 13-101 *et seq.*, Commercial Law Article, Annotated Code of Maryland. However, while the Plaintiff nakedly asserts that she is a "consumer" under the statute, and that the Property is "residential" in character (Complaint ¶ 1), her own Exhibits belie these contentions. For example, in Plaintiff's Exhibit 1, the "insured" is identified as "Fort Washington Child Dev. Ctr." This identification is repeated on Plaintiff's Exhibit 1-A, wherein the "named insured" also is defined as "Fort Washington Child Development Center." In point of fact, the building is not the Plaintiff's "residence" as she suggests; indeed, it is not anyone's residence. The Property actually is being used for a commercial enterprise. This reality is underscored on Plaintiff's Exhibit 1-A where the insurance product is labeled as "BusinessPro Property Coverage." This "BusinessPro" policy is a type of a "*commercial* general liability" policy, not a consumer homeowner policy. *See* Plaintiff's Exhibit 1 – checked block (emphasis added).

The Maryland Consumer Protection Act defines "consumer" as follows: "'consumer' means an actual or prospective purchaser, lessee, or recipient of consumer goods, consumer services, consumer realty, or consumer credit." § 13-101(c)(1), Commercial Law Article Annotated Code of Maryland. The terms "consumer credit," "consumer debts," "consumer goods," and "consumer services" are further defined collectively as "credit, debts or obligations, goods, real property, and services which are *primarily for personal, household, family or*

agricultural purposes." § 13-101(d), Commercial Law Article, Annotated Code of Maryland. In the circumstances presented in this case, the Plaintiff is not a "consumer" and the LPI at issue was not intended "primarily for personal, household, family or agricultural purposes." She is a business owner/operator and the Property at issue is one of her day care centers.

"The purpose of the Consumer Protection Act as a whole is to protect the consumer, by setting minimum standards, and to restore an 'undermined' public confidence in merchants." *Boatel Industries, Inc. v. Hester*, 77 Md. App. 284, 302-03, 550 A.2d 389, 398-99 (1988)(internal citations omitted). In evaluating the word "primarily" as it relates to personal, household, family, or agricultural purposes in the statutory definition, the Maryland courts have concluded that the statute's main purpose is "protecting the consumer" while it is "less concerned with protecting businessmen." *Id.*, 77 Md. App. at 304, 550 A.2d at 399.

Stated simply, although the Plaintiff claims to be a "consumer" under the statute, this is simply a "naked assertion devoid of further factual enhancement." *Bell Atlantic v. Twombly, supra*, 550 U.S. at 555 n.3. The Exhibits she filed with her Complaint reveal that the Property at issue is one of the several daycare centers owned and operated by the Plaintiff, that it is not being used as anyone's residence, and that the insurance coverage she obtained through her agent for the Property was commercial and not household in nature. Accordingly, she has failed to sufficiently allege her status as a legitimate "consumer" so as to bring the facts of this case within the ambit of the Maryland Consumer Protection Act. For this reason, this Count should be dismissed.

VIII. THE BANK HAS NOT BREACHED ITS CONTRACT WITH THE PLAINTIFF.

In Count I of her Complaint, Plaintiff purports to bring a claim for breach of contract against Wells Fargo. This claim, however, is deficient as a matter of law as well. "Under

Maryland law, the elements of a breach of contract claim are (1) a contractual obligation and (2) a material breach of that obligation." *Allstate Ins. Co. v. Warns*, 2012 WL 681972 at *10 (D.Md Feb. 29, 2012) *citing Taylor v. NationsBank, N.A.*, 365 Md. 166*,* 776 A.2d 645 (2001). While there certainly is a contract between the parties here, the Plaintiff cannot point to a single provision that has been breached by Wells Fargo.

In her Complaint, the Plaintiff properly focuses on Section 5 of the Deed of Trust as a key provision that defines her responsibility to keep the Property insured at all times and to provide proof of that insurance when requested. That provision also allows the Bank to obtain LPI when necessary and to charge the cost thereof to the Plaintiff. *See generally* Complaint ¶¶ 15, 20, 39. However, she nonetheless claims that Wells Fargo breached the loan contract by not "informing Plaintiff of its intent to obtain CPI[3] and to charge her with the premium for the purchase of the same, obtaining CPI without Plaintiff's notice, knowledge or consent, not providing Plaintiff with the policy representing the CPI, obtaining the CPI unilaterally and unnecessarily with the full knowledge that Plaintiff has already obtained coverage sufficient to protect Defendant's collateral interest and acting in bad faith as to enforcing the terms of the Contract." Complaint ¶ 33.

Notably, Plaintiff fails to state which specific section of the Deed of Trust was breached. As such, she fails to allege even the most basic element of a breach of contract claim.

In further analyzing this claim, this Court can take notice of several key documents submitted by Wells Fargo as Exhibits to this Motion without converting the Motion to Dismiss to a Motion for Summary Judgment under Federal Rule 56. *See Phillips v. LCI Int'l, Inc.*, 190 F.3d 609 (4th Cir. 1999); *Gasner v. Dinwiddie County*, 162 F.R.D. 280 (E.D.Va. 1995). In particular,

[3] The Plaintiff has chosen to use the abbreviation "CPI" to refer to the Lender Placed Insurance policy (referred to as "LPI" herein).

in this Circuit, "documents attached to the motion to dismiss may be considered 'so long as they are integral to the complaint and authentic.'" *Fisher v. Maryland Dept. of Public Safety*, 2010 WL 2732334 at 2-3 (D.Md. July 8, 2010), *citing Philips v. County Mem. Hosp.*, 572. F.3d 176 (4th Cir. 2009). A document is "integral" if its existence is part of the foundation for the plaintiff's claims or if it is relied upon or referenced in the pleadings. *Id.*

In her pleading, the Plaintiff complains about the temporary LPI policy initiated by Wells Fargo "at some time either in 2010 or 2011" and acknowledges that the initial annual premium for this policy was $7,844.30 and the renewal premium was $8,011.20. Complaint ¶ 18. Apart from this specific reference to the purchase of the LPI, the Complaint is replete with references to the LPI purchase and her contractual agreement with Wells Fargo. Thus, the series of letters to the Plaintiff that evidence the LPI purchase "in 2010" and present her with the corresponding premium costs are integral to her claims. Accordingly, Exhibits A through D hereto can be freely considered by this Court.[4]

The first of these documents is dated May 20, 2010, when Wells Fargo sent a letter to the Plaintiff, after having received notice of cancellation from her insurance company for non-payment of premium, which stated in pertinent part:

> A recent review of your mortgage documents revealed we do not have complete insurance information for your loan. To ensure proper servicing of your loan, we request that you provide a copy of your insurance policy(ies) as of 5/5/10.
>
> To protect your property, we secured *temporary* insurance coverage through QBE Insurance Corporation for your property.

[4] Worthy of note is the fact that the Plaintiff has filed a nearly identical Complaint against Wells Fargo in the District of Columbia, presenting many of the same claims there in relation to another of her commercial day care centers located within the District. Attached as Exhibits to her Complaint in that case are copies of the same form notice letters (like Exhibits A-D herein) she received from Wells Fargo in relation to her DC property insurance. *See generally Cannon v. Wells Fargo Bank, N.A.* in the U.S. District Court for the District of Columbia, Case No. 1:12:cv-00465-CKK. It is not clear why she did not similarly append the notice letters to her Complaint in this case.

> This binder cannot be renewed. It covers your real property (dwelling) only for risks of direct loss subject to the terms of the policy. It does not protect your personal property, nor does it provide you with liability protection.
>
> …
>
> *Upon receipt of your sufficient insurance coverage, we will promptly cancel this binder. There is no charge to you if there has been no lapse in coverage.* Without evidence of insurance, we may obtain a one-year policy for your property. The attached binder shows the full-year premium that will be charged for this policy if we do not receive evidence of your hazard insurance effective 5/5/10. Please note the full-year premium for this policy, if issued, will be $7,844.30.
>
> Your loan agreement requires that you provide a copy of your current insurance policy(ies). Receipt of your updated insurance information is crucial to our properly servicing your loan. Please contact your agent or insurance company and purchase coverage. If you have already done so, please request proof of coverage and send it to us at the following address.
>
> …
>
> Since insurance purchased by Wells Fargo Bank insures your property without inspection, the cost may be *substantially higher* than the cost of insurance that you can obtain through your own agent. The insurance purchased by Wells Fargo Bank may provide less coverage than your previous policy. An affiliate of Wells Fargo Bank may receive a commission or other compensation if insurance is obtained by Wells Fargo Bank. A policy purchased on your behalf may be canceled at any time by Wells Fargo Bank, and will be canceled *when you provide evidence of other sufficient insurance coverage*.

See Exhibit A hereto (emphasis added). If this excerpted text of the letter did not catch the Plaintiff's eye, the large-type bold-faced warning that underscored the key elements of the LPI and which was included with this letter cannot have escaped her attention:

IMPORTANT NOTICE

THE ATTACHED IS A BINDER FOR THE

TEMPORARY INSURANCE COVERAGE OBTAINED BY WELLS FARGO BANK. THE ATTACHED IS NOT A PREMIUM INVOICE OR BILL, NOR IS THE ATTACHED AN INSURANCE POLICY.

Wells Fargo Bank has not received Evidence of Insurance Coverage. As part of your loan agreement, you agreed to provide continuous insurance coverage on the collateral property.

Please contact your insurance agent or insurance company and have them provide your lender, Wells Fargo Bank, with evidence of insurance coverage as soon as possible.

If Wells Fargo Bank does not receive evidence of insurance, we may obtain insurance protecting the collateral property. You will be notified if this occurs and will receive an insurance policy. Under the terms of your loan agreement, this insurance premium will be charged to your loan account and will be reflected in applicable Payoff Statements. In the event that a policy is issued, you may also directly pay for the premium associated with the Lender Placed Insurance. Please make your check payable to Wells Fargo Bank and forward it to PO Box 8129, Jacksonville, FL 32239-8129. Payment should not be made payable to the insurance carrier.

See Exhibit A.

When proof of insurance was not forthcoming, Wells Fargo sent another letter to the Plaintiff on June 22, 2010, which stated: "We previously notified you we have not received a new or renewal insurance policy covering your property. It appears you do not have insurance coverage as of 5/5/10." *See* Exhibit B hereto. That letter then goes on to repeat almost verbatim many of the same warnings provided in the previous letter sent on May 20, 2010.

Having still heard nothing from the Plaintiff or received any proof of insurance, Wells Fargo wrote yet again to the Plaintiff on August 3, 2010, stating that LPI had been purchased for the Property, effective from 5/5/10 to 5/5/11:

> Enclosed is the lender placed hazard insurance policy purchased in accordance with your mortgage documents and/or Deed of Trust. This policy was purchased because *we did not receive evidence of hazard insurance coverage for your property*. QBE Insurance Corporation now insures your real property (dwelling). The declaration page shows the annual premium of $7,844.30.
>
> Please understand that under the terms of your loan agreement, this insurance premium will be charged to your loan account and will be reflected in applicable Payoff Statements. If you prefer to pay the premium associated with the lender placed insurance, please make your check payable to Wells Fargo Bank and send it to P.O. Box 8129, Jacksonville, FL 32239-8129. Payment should not be made to QBE Insurance Corporation.
>
> …
>
> Upon receipt of your sufficient evidence of insurance coverage, we will promptly cancel this policy.

See Exhibit C.

Surprisingly, Wells Fargo still did not receive proof of insurance coverage from the Plaintiff and, by letter dated May 17, 2011, the Bank advised her of the *renewal* of the LPI policy that had now been in effect for a full year. *See* Exhibit D. Once again, the Plaintiff was advised in that letter that "this policy may be canceled at any time by giving us proof of other insurance. You will then be charged for only the days that this policy was needed." *Id*.

It was not until January 9, 2012, that Wells Fargo finally received proof of insurance from the Plaintiff's agent. *See* Plaintiff's Exhibit 1 (Certificate of Liability Insurance dated November 7, 2011). The very next day, Wells Fargo <u>cancelled</u> the LPI policy that had been in

effect since May of 2010 and re-credited the Plaintiff's account with the amount of both annual premiums. *See* Plaintiff's Exhibits 3 and 4 (Notices of Cancellation).[5]

In short, the purchase of the LPI policy about which the Plaintiff now complains in this lawsuit was necessitated by her own failure to discharge her duty under the Deed of Trust to provide satisfactory written confirmation of extant hazard insurance on the Property. Had she done so, Wells Fargo never would have had to send out the chain of letters or obtain substitute LPI coverage. Perhaps most important, because she ultimately *did* provide evidence of uninterrupted insurance coverage on the Property, the substitute LPI policy was canceled and none of the related charges or premiums ever were collected from the Plaintiff. Indeed, the posting of those premium charges to her account was reversed, consistent with the written representations previously given to her. Thus, while the Plaintiff claims that she actually paid the LPI premiums for both years (e.g. Complaint ¶¶ 24, 35, 54), in fact, she never paid any premiums and the Bank is not seeking payment of them from her.

Examining each element of this allegation, consider that the Bank issued a sequence of warning letters to the Plaintiff, each increasing in intensity, culminating in the purchase of LPI after the Plaintiff failed to produce any proof of insurance on the Property for over a year and a half. Included in those communications were several warnings, including a declaration of the annual premium amount for the LPI for each of the two successive years it was in force. Wells Fargo admits that it obtained the LPI "unilaterally" (as the Deed of Trust expressly permits) but disputes that it was unnecessary, considering the Plaintiff's recalcitrant refusal to produce evidence of insurance in response to the Bank's reasonable requests. The Bank was left

[5] The Notices of Cancellation were sent to the Plaintiff on January 12, 2012, advising her of the LPI policy cancellation as well as the recrediting of the two annual premiums that had been posted as expense disbursements to her account, almost four weeks *before* this suit was filed.

completely in the dark by the Plaintiff as to whether there was any insurance in force protecting the Property and it was compelled to obtain the LPI out of prudence.

In short, each and every act undertaken by Wells Fargo in this case was accomplished under color of contractual entitlement, pursuant to an agreement executed by the Plaintiff. A fair reading of her Complaint does not reveal a single term in her contract with the Bank that has been breached. Because of that failure, Count I should be dismissed.

CONCLUSION

The Plaintiff, individually, and on behalf of a putative class of similarly situated persons she seeks to represent, has sued Wells Fargo under seven different legal theories, all derived from the central allegation that the Bank improperly obtained LPI on her business property after she failed to produce proof of insurance in response to numerous legitimate requests for same. She intimates (inaccurately) that she was caused to pay the premiums for the duplicative but unnecessary LPI coverage. However, none of the seven Counts in the Complaint states a claim against Wells Fargo upon which relief can be granted.

The Plaintiff has failed to satisfy the elemental pleading requirements for all of her common law tort claims. She has not identified any misrepresentation issued by Wells Fargo with the degree of particularity demanded by the Federal Rules. Neither has she identified any tangible or intangible property that today remains in the hands of Wells Fargo. Perhaps most important, she has not suffered any actual damages as a result of the conduct set forth in the Complaint, leaving Wells Fargo to wonder why she filed this case at all *after* receiving the two Notices of Cancellation. *See* Plaintiff's Exhibits 3 and 4. In short, there is no substantiation in the Complaint for her claim that Wells Fargo breached any duty it might have owed to her, fiduciary or otherwise.

Finally, neither the Plaintiff nor this particular transaction fall within the ambit of the Maryland Consumer Protection Act. She is a business owner, operating a licensed day care center out of the Property at issue. Her insurance (for which the LPI was obtained as a replacement) was a *commercial* general liability policy. Accordingly, the Plaintiff is not a "consumer" as defined in the statute and its remedies are not available to her in this case.

The Plaintiff cannot point to a single provision in her contract with Wells Fargo that has been breached. In fact, every action undertaken by Wells Fargo was specifically authorized by the written agreement between the parties. Furthermore, the very existence of that written agreement precludes the Plaintiff's claim for unjust enrichment. Even if that were not the case, she has not identified any tangible benefit as to which it would be unjust for Wells Fargo to retain.

For all of these reasons, Wells Fargo respectfully requests that this Honorable Court grant its Motion and dismiss the Complaint in its entirety, with prejudice.

/s/ Russell J. Pope

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